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No. [redacted] (3)

03-1328

Supreme Court, U.S.
FILED
APR 19 2004
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In the Supreme Court of the United States

JEANNE WOODFORD, PETITIONER,

v.

KEVIN COOPER, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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SUPREME COURT, U.S.

The Respondent, Kevin Cooper, requests leave to file the attached Brief in Opposition to Petitioner's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Respondent's counsel is aware that Respondent was previously granted leave to proceed *in forma pauperis* in the California Supreme Court, the United States Court of Appeals for the Ninth Circuit.

An affidavit from Kevin Cooper is further attached in support of this motion.

Dated: April 16, 2004

Respectfully submitted,

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No. 04-70578

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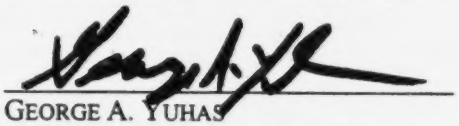
The Respondent, Kevin Cooper, requests leave to file the attached Brief in Opposition to Petitioner's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Respondent's counsel is aware that Respondent was previously granted leave to proceed *in forma pauperis* in the California Supreme Court, the United States Court of Appeals for the Ninth Circuit.

An affidavit from Kevin Cooper is further attached in support of this motion.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

1. Whether the limitations in 28 U.S.C. Section 2244(b) on a party's ability to file a rehearing petition from a determination of whether a *habeas* petitioner has satisfied the standards for filing a successor petition preclude a court of appeals from *sua sponte* correcting a panel's erroneous application of that provision.

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No. 04-70578

In the Supreme Court of the United States

JEANNE WOODFORD, PETITIONER,

v.

KEVIN COOPER, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kevin Cooper respectfully submits this brief in opposition to Petitioner's Petition for Writ of *Certiorari*.

STATEMENT OF THE CASE

On February 9, 2004, the Ninth Circuit Court of Appeals, on its own motion, vacated the three-judge panel's two-to-one decision denying Mr. Cooper – Respondent in this action – authorization to file a successor petition.[1] *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (*en banc*). Thereafter, an eleven-member *en banc* panel heard the matter and, by a nine-to-two vote, issued an order concluding that Mr. Cooper had satisfied the requirements of 28 U.S.C. Section 2244(b)(3) and authorized the filing of the successor petition. *Id.* In so doing, the Ninth Circuit expressly determined that Section 2244(b)(3)(E)'s limitations on a

[1] The Antiterrorism and Effective Death Penalty Act of 1996 amended Section 2244(b)(3) of Title 28 ("AEDPA") to provide that the Court of Appeals act as the gatekeeper for the filing of successor *habeas* petitions in federal court. The "new restrictions on successive petitions constitute a modified *res judicata* rule, a restraint on what used to be called in habeas corpus practice 'abuse of the writ.'" *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996)).

party's ability to seek rehearing and *certiorari* review of a panel's decision did not remove the court's jurisdiction to rehear such a decision *sua sponte*.

In response to the Ninth Circuit's actions, the Warden, Petitioner in this proceeding, immediately moved this Court for an order vacating the stay of execution. *Woodford v. Cooper*, Case No. 03A687.[2] The Warden predicated her motion on her belief that "the Ninth Circuit's undertaking [was] a level of review that congressional reform precludes Cooper himself from seeking in the Ninth Circuit or this Court." Application to Vacate Stay of Execution of *En Banc* Panel] at 2. Specifically, the Warden argued that Section 2244(b)(3)(E)'s limitation on a party's ability to seek rehearing also deprived the Ninth Circuit of its authority *sua sponte* to hear the matter *en banc*. *Id.* at 9. This Court denied the Warden's Application without comment. *Woodford v. Cooper*, ___ U.S. ___, 124 S.Ct. 1197 (2004).

The Warden then returned to this Court, seeking to stay the mandate of the Ninth Circuit and thus delay the resolution of the claims in Mr. Cooper's successor petition pending the filing of a petition for writ of *certiorari*. Mr. Cooper opposed the application, arguing that the Warden was seeking merely to relitigate the issue unsuccessfully presented in her previous application. On March 1, 2004 this Court denied the Warden's application.

Now the Warden appears before this Court for the third time, seeking a writ of *certiorari*. The Warden's interpretation of 28 U.S.C. Section 2244(b)(3) and insistence that Congress withdrew the Ninth Circuit's inherent jurisdiction to correct erroneous decisions of a three-judge panel is without any support. The Ninth Circuit acted in accordance with the provisions of the AEDPA. Accordingly, Petitioner has not presented a question suitable for review.

REASONS FOR DENYING THE PETITION

The *en banc* decision below represents the Ninth Circuit's error-correcting

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[2] The Warden filed two such applications on February 9, 2004. The first was filed prior to the issuance of the *en banc* decision of the Ninth Circuit. *Cooper v. Woodford*, Case No. 03A686. The grounds raised in support of both applications were virtually identical.

function, as authorized by federal statute. The panel's *sua sponte* motion to rehear Respondent's application for authorization to file a successive *habeas* petition presents no deviation from accepted protocol. The circuits that have addressed *sua sponte* review of applications under 28 U.S.C. § 2244 have unanimously reasoned that such action is within the power of the courts of appeals. Petitioner's attempt to characterize the question presented as "vitally important to the interests of the states in enforcing their criminal laws" (Petition at 5) ignores the simple fact that there is no conflict among the circuits with respect to this question. The plain language of Section 2244 allows for the action taken by the Ninth Circuit in this case, and raises no question of statutory misinterpretation.

I. THE WARDEN HAS PRESENTED NO ISSUE WORTHY OF PLENARY REVIEW, AS THE NINTH CIRCUIT WAS WELL WITHIN ITS AUTHORITY TO *SUA SPONTE* GRANT REHEARING OF THE PANEL'S DECISION

The Warden has failed to present a question worthy of a grant of review.[3] As a matter of judicial discretion, a writ of *certiorari* is not permitted as of right. Supreme Ct. R. 10. A petitioner must present a question of importance to the public, a "real and embarrassing conflict of opinion and authority between the courts of appeals." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). The Warden, on her third attempt before this Court, fails to present such a question.

The Warden's petition somewhat misleadingly argues that a "sharp division has arisen among the judges of two circuits concerning this questionable exercise *en banc* authority." Petition at 6. In support of her assertion of "a sharp division," the Warden cites to *In re Byrd*, 269 F.3d 585 (6th Cir. 2001) and *Thompson v. Calderon*, 151 F.3d 918 (9th Cir. 1998). Far from evidencing a "sharp split" between the Sixth and Ninth Circuits, the majority and concurring opinions in these decisions uniformly concluded that the circuit courts have the

---

[3] Section 2244 explicitly prevents parties from petitioning this Court for a writ of *certiorari* following the grant or denial of an authorization by the Court of Appeals to file a successive *habeas* application 28 U.S.C. § 2244(b)(3)(e). The Warden's current petition directly involves such authorization. To grant the petition would call into question a circuit court's ability to define its own procedural mechanisms with respect to *en banc* rehearings.

power to engage in *sua sponte en banc* review. Thus, there is no split at all between or among the circuits. What the Warden is referring to, disingenuously perhaps, is that an individual judge in each case disagreed by dissent. That does not constitute a split among the circuits.

A. The Plain Language of the Statute Permits *Sua Sponte En Banc* Review

The entirety of the language in Section 2244 pertaining to rehearing is contained in subsection (b)(3)(E), which states, "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). With respect to rehearings, the statute by its own terms prohibits only *petitions* for rehearing. Circuit courts, however, have extended the reach of the statute to preclude not only petitions for rehearing, but also petitions for rehearing *en banc*. *In re King*, 190 F.3d 479 (6th Cir. 1999); *United v. Lorensten*, 106 F.3d 278 (9th Cir. 1997). Nothing in the AEDPA, however, removed the inherent power of a court of appeals to correct an erroneous three-judge panel decision on its own motion. Furthermore, every court to examine the issue has concluded that a court of appeals retains the authority to reconsider, *sua sponte*, a panel's decision. *See Cooper v. Woodford*, 358 F.3d at 1118; *In re Byrd*, 269 F.3d 585 (6th Cir. 2001); *Triestman v. United States*, 124 F.3d 361, 366 (2d Cir. 1997).

In *Triestman v. United States*, 124 F.3d 361, 366 (2d Cir. 1997), the court addressed the question of whether it had the authority to order a rehearing *sua sponte*. In answering the question in the affirmative, the court concluded that Section 2244(b)(3)(E) "provides only that a disappointed litigant may not ask the court to reconsider its certification decision. By its plain terms, it does not purport to limit the court's own power to review its decisions or to undertake a rehearing." *Id.* at 367. Thus, the *Triestman* court held that "under the AEDPA, a court of appeals retains the authority to order a rehearing *sua sponte*." *Id.*

The *Triestman* interpretation of Section 2244 comports with the purpose behind the statute. As explained in the later decisions of *In re Byrd* and *Thompson v. Calderon*, the purpose of the statute is to limit requests for review by *petitioners*. The statute does not, and

makes no effort to, encroach upon the inherent function of the circuit courts as reviewing courts. *See, e.g., Irving v. United States*, 162 F.3d 154, 161 (1st Cir. 1998) ("This authority to overrule the decision of a prior panel in the same case flows logically from the error-correction function of the full court."). "While this section clearly prohibits a petitioner from requesting a rehearing, nothing in its test bars a federal appellate court from rehearing a matter *en banc* upon its own motion." *In re Byrd*, 269 F.3d at 591 (Cole, J. concurring). Similarly, the court in *Thompson*, citing *Triestman*, held that the language of Section 2244 "does not preclude *sua sponte* review by an *en banc* court. It merely precludes the parties from seeking a rehearing." *Thompson v. Calderon*, 151 F.3d 918, 922.

B. Well-Established Interpretation of the Judiciary's Inherent Powers Supports *Sua Sponte En Banc* Review

In addition to the plain language of the statute, well-established interpretation of the judiciary's inherent powers supports *sua sponte en banc* review. In support of her position that the courts of appeals lack this *sua sponte* authority, the Warden cites and compares the following language from 28 U.S.C. Section 2244(b)(3):

> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> . . . .
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

The Warden asserts that subsection (B), requiring the application to be decided by a three-judge panel, and subsection (E), limiting a party's ability to seek further review of a three-judge panel's decision, represents Congress's intention to divest the court of appeals, and presumably this Court, of the inherent power on their own motion, to correct erroneous decisions by three-judge panels. The Warden's claim, rejected by this Court in the denial of her motion to vacate and her motion to stay the mandate, misperceives the limitations that

Congress intended in enacting Section 2244(b)(3)(E).

Although Congress may eliminate appellate jurisdiction altogether over certain cases, *Ex Parte McCardle*, 74 U.S. 506 (1868), such limitations do not deprive the courts as established by Congress of the core judicial power in Article III: to decide what the law is. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Article III judicial power to say what the law is upon which the legislation may not intrude, is "deeply rooted in our law") (citing *Marbury v. Madison*, 5 U.S. 1 (1 Cranch) 137, 177 (1803)). The judicial power granted in sections 1 and 2 is the power to declare law, and although section 2 states that Congress may limit appellate jurisdiction (the Regulations and Exceptions Clause), Congress may not infringe upon the courts' exclusive right to interpret statutes and determine jurisdiction facts. *See Kuhali v. Reno*, 266 F.3d 93, 100 (2d Cir. 2001) (jurisdiction to determine jurisdiction derives from inherent Article III powers); *Mugalli v. Ashcroft*, 258 F.3d 52, 55 (2d Cir. 2001) ("the determination of jurisdiction is exclusively for the court to decide") (citation omitted).

Even in cases in which Congress may limit a federal court's jurisdiction, such limitations must be expressly and unequivocally made:

> We emphasized in *Johnson v. Robinson*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-74, 94 S.Ct. at 1168-69. In *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S.Ct. 2133, 2144 n.12, 90 L.Ed.2d 623 (1986).

Webster v. Doe, 486 U.S. 592, 603 (1988); *see also Castro v. United States*, ___ U.S. ___, 124 S.Ct. 786 (2003) (recognizing that courts' doors may not be closed to *habeas* petitioners "without any clear indication that such was Congress' intent").

Although the Warden cites to this Court's decision in *Castro*, she ignores that, in that case, this Court interpreted the AEDPA in a manner that recognizes federal court

jurisdiction absent "clear indication" that Congress intended to remove such jurisdiction. *Id.* at 792. Unquestionably, Congress did not clearly indicate its desire to remove the inherent power of the Court of Appeal *sua sponte* to correct erroneous decisions of three-judge panels. Congress merely intended that the application be submitted to a three-judge panel and to preclude a party from seeking rehearing and *certiorari* from the panel's decision. Thus, it is not surprising that the courts of appeal are unanimous in holding that they retain the "authority to order a rehearing *sua sponte*, despite the provision in Section 2244(b)(3)(E)." *Cooper*, 358 F.3d at 1117; *In re Byrd*, 269 F.3d at 588; *Triestman*, 124 F.3d at 366. In light of this clear authority, the Warden offers no support for her view that the Ninth Circuit lacked the inherent authority to correct the decisions of its three-judge panel.

The question presented by the Warden's Petition for Writ of *Certiorari* fails to present an issue of importance to this Court. Whether a Court of Appeals has the authority under 28 U.S.C. Section 2244 *sua sponte* to order a rehearing *en banc* is decided uniformly among the circuits that have addressed the matter. While the Warden attempts to create a conflict by citing differences among *judges*, it is clear from the cases she cites that any disagreement with the majority decisions has been expressed by dissenting judges whose opinions carry no binding or persuasive weight. The plain language of the statute and the intentions of the federal judiciary prevent parties from petitioning for rehearings and rehearings *en banc*, but do nothing to constrain the ability of courts of appeals to act on their own motion.

II. DENIAL OF THE WARDEN'S PETITION WOULD NOT AFFECT SOCIETY'S INTEREST IN FINALITY

The Warden argues in her petition that "[r]esolution of the question presented in this Petition is important to maintaining the respect of citizens for the ability of the courts to punish the guilty" (Petition at 11), implying that the recognition of a circuit court's *sua sponte* power to order *en banc* review undermines society's interest in finality of judgments. In making this argument, the Warden overlooks that the fundamental function of *en banc* review

is to correct error by the three-judge panel. By exercising *sua sponte* discretion in this instance, nine out of eleven judges on the *en banc* panel reversed an erroneous opinion, an opinion that would have led to the execution of Mr. Cooper before all claims establishing his potential innocence had been presented to the proper court.[4]

The Warden belabors the time that would be wasted by allowing circuit courts to continue this practice. The reality of the situation, however, is that the Ninth Circuit took less that 24 hours to issue its *en banc* ruling following the three-judge panel opinion. This process alone did nothing to delay Mr. Cooper's execution. Had the *en banc* panel affirmed the three-judge decision, Mr. Cooper's execution would most likely have moved forward as scheduled on February 10, 2004. Instead, the *sua sponte* vote provided the court the opportunity to correct its own error.

While finality of judgments is important, and the emotions of the victims and their families carries great significance, there is no finality more grave than that of an execution. The Warden has made no showing that circuit courts have abused their *sua sponte* power under section 2244, or even invoked it on a regular basis. Rather, it has been used judiciously, in situations such as Mr. Cooper's where a majority of judges seek to correct a mistake. Eliminating the ability of circuit courts to take such action serves no purpose, other than to ensure that future errors remain unchallenged.

---

[4] The *sua sponte* power of a circuit court to review a three-judge panel's decision is not limited to reviewing orders denying a habeas petitioner's right to file a successor petition. Accepting the Warden's position and concluding that a circuit court lacks the authority to correct erroneous authorizations to file a successor petition produces the very delay that the Warden seeks to avoid. The question is not whether the mechanism for correcting erroneous decisions is permitted, but rather whether that mechanism employed the correct standard in reaching its decision. In this case, there is no question that the Circuit Court correctly concluded that Mr. Cooper was entitled to file a successor petition.

CONCLUSION

For these reasons, the Warden's Application to Stay Mandate of the United States Court of Appeals for the Ninth Circuit Pending *Certiorari* should be denied.

Dated: April 16, 2004

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